

APPEAL NO. 020746
FILED MAY 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 14, 2002. The hearing officer resolved the disputed issues by determining that the claimant's income benefits began to accrue on March 1, 2001, for the compensable back injury of _____, and that the date of maximum medical improvement (MMI) was not ripe for adjudication because the claimant had neither been assigned an MMI date, nor reached statutory MMI based upon the March 1, 2001, accrual date. In its appeal, the appellant (carrier) argues that the hearing officer erred as a matter of law in determining the accrual date of income benefits and that claimant had not yet reached statutory MMI for the _____, compensable injury. In his response, the claimant urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable low back injury on _____. Following the _____, compensable injury, the claimant returned to work for the employer in a light-duty position. The claimant continued to work in the light-duty position until June 15, 1999, when he returned to full duty. It is undisputed that the claimant earned \$400.00 per week in the light-duty position. The claimant sustained a second compensable injury to his right arm on _____. The carrier paid temporary income benefits (TIBs) for the claimant's _____, compensable injury from July 1, 1999, to December 21, 2000, when the claimant was certified at MMI for that injury. On May 24, 2001, the parties had a hearing concerning the _____, compensable injury. At that hearing, the parties stipulated that the first certification of MMI and impairment rating did not become final pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)); that the claimant did not have disability from December 22, 2000, to February 21, 2001; that the claimant had disability from February 22, 2001, through the date of the hearing, May 24, 2001; and that the claimant's average weekly wage (AWW) is \$688.61. It should be noted that the issue before the hearing officer at the May 24, 2001, hearing was whether the claimant had disability, as a result of the _____, compensable injury, after December 22, 2000. There was no issue of whether the claimant had disability for any period prior to December 22, 2000, before the hearing officer.

The hearing officer determined that the claimant's TIBs began to accrue on March 1, 2001, the eighth day after the starting date of the period of disability stipulated to by the parties at the May 24, 2001, hearing. The hearing officer rejected the carrier's assertion that the claimant had disability within the meaning of Section 401.011(16), the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage, in the period that the claimant worked light duty at wages lower than

his preinjury AWW because the carrier did not pay TIBs in that period. The hearing officer equates payment of TIBs with disability and we have long recognized that those are separate and distinct concepts under the 1989 Act. During the time that the claimant worked light duty for the employer following his _____, compensable injury and prior to his second _____, compensable injury, he earned \$400.00 per week, well below his AWW of \$688.61. Thus, in that period, the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage and, he had disability within the meaning of the 1989 Act. See Texas Workers' Compensation Commission Appeal No. 020147, decided March 4, 2002, (affirming determination that the claimant had disability for the period he was working full time in a light-duty position based upon the fact that his earnings were lower than his preinjury wage because he worked overtime prior to the injury but was unable to work overtime while on light duty). The income benefit accrual date arose on the eighth day of disability, May 22, 1999. The hearing officer's determination that the claimant's income benefits accrual date is March 1, 2001, is reversed and a new decision rendered that the income benefits accrual date is May 22, 1999.

Based upon the May 22, 1999, accrual date of income benefits, the claimant reached statutory MMI in accordance with Section 401.011(30)(B), 104 weeks after that date, or on May 19, 2001. Accordingly, we reverse the hearing officer's determinations that the MMI issue was not ripe for adjudication and render a new decision that the claimant reached MMI for his _____, compensable injury on May 19, 2001.

The hearing officer's determination that the claimant's accrual date of income benefits was March 1, 2001, is reversed and a new decision rendered that the income benefit accrual date is May 22, 1999. The determination that the issue of the claimant's MMI date is not ripe for adjudication is likewise reversed and a new decision rendered that the claimant reached MMI by operation of Section 401.011(30)(B) on May 19, 2001.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge